

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARTIN HUDACKO et al.,

Plaintiffs and Appellants

v.

ALAN STANLY,

Defendant and Respondent.

D047487

(Super. Ct. No. GIN029692)

APPEAL from an order of the Superior Court of San Diego County, Michael Orfield, Judge. Reversed.

Martin Hudacko and his counsel, Fischbach & Fischbach (Fischbach; together appellants) appeal from a trial court order imposing a \$10,000 discovery sanction against them in favor of defendant Alan Stanly. Appellants contend that the trial court (1) abused its discretion in sanctioning them twice for the same conduct; (2) violated their due process rights by imposing the sanctions without allowing them an opportunity to be heard; (3) abused its authority in modifying an order issued by a previous judge; and (4) erred in

reconsidering a prior sanction order. Stanly asserts this appeal is frivolous, warranting additional sanctions against appellants.

We conclude that the trial court improperly sanctioned appellants twice for the same conduct; therefore we do not address their remaining arguments and decline to grant sanctions for a frivolous appeal.

FACTUAL AND PROCEDURAL BACKGROUND

The history of this litigation is contentious and complex; thus, we limit our summary of the case to matters relevant to the issues raised in this appeal.

Hudacko and Francis Lopez sued Stanly for wrongs he allegedly committed at a company in which they were all associated and Stanly cross-complained against them and another individual. In November 2004, the parties stipulated to refer all discovery disputes to a discovery referee. The following month, the trial court appointed the Honorable Lee Sarokin, a retired judge, as the referee for all discovery purposes. The appointment order required that the referee submit a written report with recommendations as to the allocation of referee fees and the imposition of sanctions and that the parties jointly pay the referee fees five days after receipt of a written statement from the referee stating the amount due. The court also reserved jurisdiction to award the prevailing party in the action referee fees as a cost of suit and "make such other and further orders with respect to this reference as may be just and proper."

On February 18, 2005, the referee issued a report on numerous discovery disputes that allocated the referee fees equally between the parties and declined to award sanctions because both parties were at fault. (All further date references are to the year 2005.) On

April 15, Stanly brought a motion before the referee for evidentiary sanctions, or in the alternative, a motion to compel discovery and for monetary sanctions based on alleged discovery abuses by Hudacko and Lopez. Three days later, Fischbach sent a letter complaining about the timing of the motion and the fact his clients would not have the opportunity to respond because the referee was out of town.

On April 28, the referee issued a report and recommendation (the April report) addressing the motion and other discovery matters. The referee made certain orders, but *reserved* the issue of monetary sanctions. Fischbach immediately complained that the referee had ruled on a motion that was not properly before him, sought to strike the motion and requested an opportunity to discuss the matter. On May 7, the referee issued a supplemental report and recommendation finding that the disputed motion was "filed in accordance with [his] directive and the agreement of counsel," but nonetheless gave Fischbach three days to respond on behalf of its clients, which it did, but apparently, the referee did not change his ruling. On May 12, the trial court entered the April report as its order.

On May 31, Stanly moved for monetary or other discovery sanctions against Hudacko and Lopez. Although Fischbach claimed that the motion improperly sought reconsideration of the referee's April 28 report, Stanly explained that it specifically addressed the referee's earlier decision to reserve sanctions and determine them at a later date based on the conduct of the parties. On June 24, the referee submitted a report and recommendation (the June report) rejecting all procedural objections to the motion and deciding, among other things, the reserved issue of monetary sanctions.

The referee recommended an award of monetary sanctions to Stanly in the amount of \$6,193.75 based on appellants' failure to produce documents, to provide a statement of damages and to timely stipulate to limit emotional distress claims. That same day, Fischbach faxed two letters suggesting the referee was prejudiced against Lopez, causing the referee to resign from the matter. On August 29, the trial court issued an order adopting, in part, the referee's June report and awarding Stanly monetary sanctions in the amount of \$1,500 as against Hudacko and \$3,698.75 as against Fischbach (the August order).

Stanly then filed a motion for "discovery sanctions" with the trial court (the October motion), requesting an order that appellants reimburse him \$14,690 for referee fees that he paid as "further" sanctions based on an "ongoing pattern of discovery abuse." Stanly argued that the referee's earlier factual findings regarding appellants' discovery abuses entitled him to recover from appellants the fees that he paid to the referee as a discovery sanction under "Code of Civil Procedure section 2023." (All undesignated statutory references are to the Code of Civil Procedure.) The Legislature repealed section 2023 in 2004 (stats. 2004, ch. 182, § 22, p. 642) and the relevant statutes for allowing sanctions against a party and counsel related to the misuse of the discovery process are sections 2023.010 et seq. After considering the written briefing and oral argument, the trial court ordered Hudacko and Fischbach, jointly and severally, to pay \$10,000 to Stanly for "reasonable expenses incurred" (the November order). Appellants appeal from the November order.

DISCUSSION

Stanly requests that we strike appellants' opening brief because it lacks the required statement explaining why the order appealed from is appealable. (Cal. Rules of Court, rule

14(a)(2)(b); all undesignated rule references are to these rules.) We disregard appellants' noncompliance in the interest of justice (rule 14(e)(2)(C)) because they set forth the appealability of the matter in their civil case information sheet, the order is appealable and Stanly does not argue to the contrary. (§ 904.1, subd. (a)(11) & (12).)

Appellants claim Stanly did not show that they committed any sanctionable conduct after the date of the August order and thus the trial court abused its discretion in sanctioning them twice for the same conduct. We agree.

Although a trial court has the power to impose a monetary sanction for "[m]isuses of the discovery process" (§ 2023.010), a sanction order "cannot go further than is necessary to accomplish the purpose of discovery" (*Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 613) and may not be used as punishment. (*Rail Services of America v. State Comp. Ins. Fund* (2003) 110 Cal.App.4th 323, 331-332.) Stated differently, discovery sanctions exist not to provide a weapon for punishment for past violations, but to secure compliance with orders of the court. (*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1183.) Although a trial court can consider prior misconduct in connection with a motion alleging *additional* discovery violations, when there is no new conduct warranting sanctions, "past conduct which has already been considered by a court cannot justify the imposition of additional sanctions; otherwise [a party or] an attorney might be punished twice for the very same conduct." (*Sabado v. Moraga* (1987) 189 Cal.App.3d 1, 10-11.)

Here, the referee recommended discovery sanctions against appellants in its June report and the trial court adopted the recommendation, in part, in its August order. The June report and August order did not address the allocation of referee fees; thus, both the referee

and trial court apparently believed that the fees should be allocated equally as required by the order appointing the referee. Stanly's October motion for "discovery sanctions" sought "further" sanctions against appellants in the amount of the referee fees paid based on an "ongoing pattern of discovery abuse," arguing that the referee's four reports demonstrated appellants' discovery abuses and the trial court could sanction them under section 2023.010.

The October motion and supporting declaration expressly rely on *past* conduct by appellants and do not delineate any sanctionable conduct after the date of the August order. Although Stanly argues that appellants raised the issue of "past sanctioned conduct" for the first time on appeal, we reject this contention as appellants' written opposition to the motion and the reporter's transcript of the hearing on the motion show they argued that Stanly improperly sought "double sanctions" based upon previous rulings by the referee and the trial court. Stanly urges that the letters Fischbach sent to the referee claiming bias against his client constituted sanctionable conduct, but we reject this contention as he did not raise it below and thus did not establish that Fischbach's conduct was improper and, in any event, an assertion of bias does not constitute a "[m]isuse of the discovery process" as this term is defined in section 2023.010.

Stanly also argues that the trial court did not issue a discovery sanction, but rather reallocated the payment of referee fees based on the trial court's reservation of jurisdiction to "make such other and further orders with respect to this reference as may be just and proper." We reject this argument because the motion requested discovery sanctions under section 2023.010 and the trial court did not purport to act under its reserved power. In any event, Stanly's argument ignores the fact that the trial court lacked the authority to require

Fischbach to pay referee fees (*Taggares v. Superior Court* (1998) 62 Cal.App.4th 94, 103 ["[s]ections 645.1 and 1023 permit the court to order 'the parties' -- *not* counsel for the parties -- to pay the referee's fees"]) and any ruling as to Hudacko amounted to an improper reconsideration of its August order without new facts. (§ 1008.) Nonetheless, the trial court still retains the power to award the prevailing party in the action referee fees as a cost of suit or make other such orders as may be proper.

We reverse the November order and deny Stanly's request that sanctions be imposed on appellants for filing a frivolous appeal.

DISPOSITION

The order is reversed. Appellants are entitled to their costs on appeal.

McINTYRE, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.